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EXAMINER

PICKETT, JOHN G

ART UNIT

PAPER NUMBER

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Please find below and/or attached an Office communication concerning this application or proceeding.

DETAILED ACTION

1. This Office Action acknowledges the applicant's request for reconsideration submitted 16 February 2006. No claim amendments are presented; therefore, claims 1-71, as presented in the amendment of 15 July 2005 are pending in the application.
2. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

Claim Rejections - 35 USC § 103

3. Claims 1-5, 7, 8, 10-13, 15-18, 20-40, 42, 43, 45-48, 50, and 52-71 are rejected under 35 U.S.C. 103(a) as being unpatentable over Goncalves (US 5,209,565) in view of admitted prior art and Spielman (US 3,941,270).

In paragraph [003] of the instant application, the applicant describes the prior art and notes that the cap of a tube of dye cream, "may be closed by a cap, which may have a spike on its exterior top wall." This is considered admitted prior art. The spike designed to perforate the tube seal and can be considered a "perforating member".

Claims 1, 21, 22, 64, 66, 67, 69, and 71: Goncalves discloses a system for mixing at least two products (see Figure 1) comprising a first container **3** with a first opening (portion defined by neck **28**), first coupler **21**, and safety member **19**; and a second container **2** comprising a second opening (portion defined by neck **6**), seal **7**, second coupler **8**, and removable stopper **9**. At an instantaneous position during connection of the two containers, the safety member contacts the seal without breaking;

therefore the safety member is considered "configured to" press against the seal as claimed. The first opening is not completely obstructed by safety member **19** (note portion **18**) and since safety member extends into the area defined by neck **28**, it is considered to extend through the first opening.

Goncalves merely lacks the perforating member and a blunt safety member.

As to the perforating member, paragraph [003] of the instant application notes that it was common to provide the cap (i.e. removable stopper) with a spike capable perforating the seal of a tube. It would have been obvious to one of ordinary skill in the art at the time the invention was made to provide removable stopper **9** of Goncalves with a spike, as was common practice, in order to enable manual puncturing of seal **7** and thereby allow separate use of tube **2**.

As to the blunt safety member, Goncalves (as modified with a spike on its cap) discloses the claimed invention except that Goncalves uses a sharp safety member instead of a blunt safety member. Spielman shows that a blunt safety member **48** was an equivalent structure known in the art (see Figures 2 and 3 as compared to Goncalves, Figure 2). One of ordinary skill in the art would recognize that each piercing means would have its own advantages and disadvantages yet both are suitable for the function of piercing the seal. For example, the sharp edge creates a better tear of the seal but would be expensive to make due to the creation of the sharp edge; conversely the blunt edge would be less expensive to fabricate. Accordingly, because these two piercing means were art-recognized equivalents at the time the invention was made, one of ordinary skill in the art would have found it obvious to substitute the blunt safety

member of Spielman for the sharp safety member of Goncalves in order to reduce the costs of fabrication.

Claim 2: seal **7** of Goncalves is a film seal.

Claims 4, 5: safety member **48** of Spielman extends beyond the first opening as claimed.

Claims 7, 8, and 10: As evidenced by claim 10, the opening element/cutting device can be a portion of the safety member. As such, the wedge-shaped sides of the tip of Spielman can be considered an opening element/cutting device since they affect the spreading and subsequent cutting of the inserted seal.

Claim 11: Goncalves discloses couplers **8** and **21** that are screw threads.

Claims 12, 13, 15-17: Goncalves discloses a neck (portion at base of **40**) and hollow shaft **20** with coupler **21** located on hollow shaft **20**, head **15**, and body **12**. The safety member extends within the hollow shaft.

Claim 23: container **3** of Goncalves is plastic and is elastically deformable.

Claim 24: Goncalves discloses the claimed invention except for the claimed polyethylene material. It would have been obvious to one of ordinary skill in the art at the time the invention was made to provide the container in the claimed material in order to provide a lightweight and durable container. It has been held to be within the general skill of a worker in the art to select a known material on the basis of its suitability for the intended use as a matter of obvious design choice. *In re Leshin*, 125 USPQ 416.

Claim 25: container **2** of Goncalves is a tube.

Claim 26: Goncalves discloses the claimed invention except for the claimed aluminum material. It would have been obvious to one of ordinary skill in the art at the time the invention was made to provide the container in the claimed material in order to provide a lightweight and durable container. It has been held to be within the general skill of a worker in the art to select a known material on the basis of its suitability for the intended use as a matter of obvious design choice. *In re Leshin*, 125 USPQ 416.

Claims 27-29: Goncalves discloses the claimed products (see for example, Col. 1, lines 14-24).

Claims 30-35: insofar as the examiner can determine the scope of the claim, Goncalves-Spielman, as applied to claim 1 above, discloses the claimed method (see Goncalves Figure 2).

Claims 3, 36, 38, 53, 54, and 68: Goncalves-Spielman, as applied to claim 1 above, discloses the claimed invention. The safety member of Spielman is configured as claimed.

Claim 37: seal 7 of Goncalves is a film seal.

Claims 39 and 40: safety member 48 of Spielman extends beyond the first opening as claimed.

Claims 42, 43, and 45: As evidenced by claim 45, the opening element/cutting device can be a portion of the safety member. As such, the wedge-shaped sides of the tip of Spielman can be considered an opening element/cutting device since they affect the spreading and subsequent cutting of the inserted seal.

Claim 46: Goncalves discloses couplers 8 and 21 that are screw threads.

Claims 47, 48: Goncalves discloses a neck (portion at base of **40**) and hollow shaft **20** with coupler **21** located on hollow shaft **20**, head **15**, and body **12**. The safety member extends within the hollow shaft.

Claims 55-57: Goncalves discloses the claimed products (see for example, Col. 1, lines 14-24).

Claims 58-63: insofar as the examiner can determine the scope of the claim, Goncalves-Spielman, as applied to claim 36 above, discloses the claimed method (see Goncalves Figure 2).

Claims 18, 20, 50, 52, 65 and 70: Goncalves-Spielman, as applied to claim 1 above, discloses the claimed invention, including cap member **16**. Shaping of the cap member (for example with a dome top) to accommodate the blunt safety member of Spielman would have been obvious in order to maintain its stated function of closing the opening (portion defined by neck **28**). A change in form or shape is generally recognized as being within the level of ordinary skill in the art, absent any showing of unexpected results. *In re Dailey et al.*, 149 USPQ 47.

Allowable Subject Matter

4. Claims 6, 9, 14, 19, 41, 44, 49, and 51 are objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

5. As allowable subject matter has been indicated, applicant's reply must either comply with all formal requirements or specifically traverse each requirement not complied with. See 37 CFR 1.111(b) and MPEP § 707.07(a).

Response to Arguments

6. Applicant's arguments filed 16 February 2006 have been fully considered but they are not persuasive.

7. In response to applicant's argument that there is no suggestion to combine the references, in order to rely on equivalence as a rationale supporting an obviousness-type rejection, the equivalency must be recognized in the prior art. *In re Ruff*, 256 F.2d 590, 118 USPQ 340 (CCPA 1958). Spielman represents evidence that blunt and sharp safety members were art-recognized equivalent structures for piercing a seal. Because these two piercing means were art-recognized equivalents at the time the invention was made, one of ordinary skill in the art would have found it obvious to substitute one for the other. An express suggestion to substitute one equivalent component or process for another is not necessary to render such substitution obvious. *In re Fout*, 675 F.2d 297, 213 USPQ 532 (CCPA 1982).

8. In response to the applicant's argument that Goncalves "teaches away" from a perforating member on the tube closure, nothing in Goncalves would lead one of ordinary skill in the art to believe that a perforating member would in some way be

detrimental to the arrangement. The individual components **2 & 3** of Goncalves are usable either together or separately. Disclosed examples and preferred embodiments do not constitute a teaching away from a broader disclosure. *In re Susi*, 440 F.2d 442, 169 USPQ 423 (CCPA 1971). The addition of a perforating member on the closure of a tube was well known in the art and its inclusion on the closure of tube **2** would have been obvious. This inclusion would in no way hinder the combined usage of the individual components since the closure is first removed prior to assembly. It is therefore not seen how Goncalves “teaches away” from the perforating member.

9. In response to the applicant's assertion that the equivalency has not been identified, Spielman, Figures 2 and 3 and Goncalves, Figure 2 clearly show the equivalency of the structures and were previously identified. An express suggestion to substitute one equivalent component or process for another is not necessary to render such substitution obvious. *In re Fout*, 675 F.2d 297, 213 USPQ 532 (CCPA 1982).

10. In response to applicant's argument that Spielman teaches away from “sharp safety members”, this argument is irrelevant since there is no proposed modification to Spielman. Further, the test for obviousness is not whether the features of a secondary reference may be bodily incorporated into the structure of the primary reference; nor is it that the claimed invention must be expressly suggested in any one or all of the references. Rather, the test is what the combined teachings of the references would

have suggested to those of ordinary skill in the art. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981).

Conclusion

THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Gregory Pickett whose telephone number is 571-272-4560. The examiner can normally be reached on Mon-Fri, 11:30 AM - 8:00 PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Mickey Yu can be reached on 571-272-4562. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Art Unit: 3728

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).



Greg Pickett
Examiner
1 May 2006



Mickey Yu
Supervisory Patent Examiner